IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1864

SAVE OUR WETLANDS, INC. (SOWL) BY MARY HALPIN, PRESIDENT AND FRANCOIS JELALIAN,
Petitioners,

versus

UNITED STATES ARMY CORPS OF ENGINEERS, AND ITS OFFICERS AND EMPLOYEES, THE ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, LEISURE, INC., THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT THROUGH THEIR NAMED ADMINISTRATORS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF ON BEHALF OF ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, AND LEISURE, INC.

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INDEX

AUTHORITIES

AUTHORITIES (Continued)

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OPPOSITION BRIEF ON BEHALF OF ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, AND LEISURE, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F2d 1021. The Orders of the district court dismissing petitioners' complaint are unreported, but these Orders and the Special Master's Reports are included as appendices to the Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC 1254(1).

RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether, based on the applicable facts, the Court of Appeals correctly held that petitioners' suit to enjoin further work at a "substantially complete" real estate development was barred by the doctrine of laches.

RESPONDENTS' STATEMENT OF THE CASE

The Court of Appeals found that the "plaintiffs' principal allegation concerned the validity of certain permits issued to Leisure . . . by the United States Army Corps of Engineers . . . Plaintiffs alleged that the Corps had violated the National Environmental Policy Act . . . and various other federal statutes, by issuing the permits pursuant to Section 10 of the Rivers and Harbors Appropriation Act . . ." (549 F2d at 1023)

In petitioning this Court, Petitioners seek to require the preparation of an environmental impact statement with respect to the work performed several years ago pursuant to duly issued permits.

The Eden Isles development, which the complaint challenged, was actually begun in approximately 1927, when the area was enclosed with dikes, levied, drained, and a governmental Drainage District established. (549 F2d 1024) In 1962, the Drainage District's governing body began a program to develop the area, at a cost of millions of dollars of public money. (549 F2d at 1024)

In 1969, Leisure, Inc. acquired the property, and between 1969 and the trial of the case in 1974, Leisure spent over $26,000,000 on development. Throughout the entire period, work progressed without objection from anyone, and pursuant to a permit issued by the United States Army Corps of Engineers. (549 F2d 1028-29)

The Court of Appeals held that Petitioners' complaint was barred by laches, finding that Petitioners were guilty of unreasonable delay, that the delay was inexcusable, that the project was "substantially complete", and that postponement of further development would unduly prejudice the local governmental district and the developer, Leisure. (549 F2d at 1029)

Plaintiffs are now seeking review of the unanimous decision of the Court of Appeals which affirmed the District Court, which adopted the Report of the Special Master (Magistrate Morey Sear, who was shortly thereafter appointed to the bench for the Eastern District of Louisiana). Five Federal judges have now rejected Petitioners' contentions, without dissent, in several lengthy, and well-reasoned opinions.

RESPONDENTS' RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED

1 — *Response to Petitioners' First "Question Presented"*

In their first "Question Presented", Petitioners argue that certiorari should be granted to determine whether a *claim* that an environmental impact statement is needed can be barred by laches, in an environmental case.

The Court of Appeals rejected Petitioners' argument, stating:

> "The district court found that the defendants had expended over $26,000,000 on the Eden Isles project before the trial of this action. Moreover, large portions of the project had been substantially completed by that time. This case, therefore, is distinguishable from the cases in which the amounts expended were large in absolute terms but represented a relatively small percentage of the total expenditures anticipated. In view of the substantial sums expended and the extent of construction which has been completed on the Eden Isles project, we conclude that preparation of an EIS at this point would produce very little, if any, environmental benefit. This conclusion is also compelled by the testimony of one of SOWL's own witnesses, who concluded that the Eden Isles development would have a minimal environmental impact on the MPCB ecosystem."

> "In light of the plaintiffs' delay in bringing this action, therefore, we conclude that the requested postponement of further construction on this substantially completed project, pending preparation of an EIS, would unduly prejudice the defendants." (549 F2d 1028-29)

The holding of the Court of Appeals is in accord with the basic rationale for requiring an environmental impact statement, under the National Environmental Policy Act (42 USC 4321 *et seq.*). An EIS is prepared to determine ecological impact *before* the project is authorized and *before* an area is affected. *Clark vs Volpe*, 342 F.Supp. 1324, 1330 (ED La.-1972), aff'd 461 F2d 1266 (CA 5-1972).

As the Court of Appeals in this case stated: "It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation. *Ecology Center vs Coleman*, 515 F2d 860, 867 (5th Cir.-1975); *Clark vs Volpe*, 342 F.Supp. 1324 (ED La.-1972), aff'd. 461 F2d 1266 (CA 5-1972)." (549 F2d 1026) The Fifth Circuit's position is consistent with the holdings of the other circuits. *Steubing vs Brinegar*, 511 F2d 489, at 494 (CA 2-1975); *Pennsylvania Environmental Council vs Bartlett*, 315 F.Supp. 238 at 246 (MD Pa.-1970), *aff'd* 454 F2d 613 (CA 3-1971); *Environmental Defense Fund vs Tennessee Valley Authority*, 468 F2d 1164, at 1182 (CA 6-1972); *Lathan vs Volpe*, 455 F2d 1111, at 1122 (CA 9-1972).

Not only is the basis for the Court of Appeals' decision in this case correct, but the factual and legal arguments urged by Petitioners are groundless. In support of their argument that an EIS is required at

this late date, Petitioners, who have never challenged any of the facts found by the lower courts, urge consideration by this Court of several factual matters which are not supported in the record. Although petitioners contend that the development will have adverse environmental effects, the Court of Appeals, District Court, and Special Master all found that the development would have "minimal environmental impact", based on testimony of petitioners' own witnesses. (594 F2d 1029)

To support Petitioners' factual contention that the development will have an adverse environmental impact, petitioners rely on a so-called environmental investigation by Burke & Associates which does not appear in the record in these proceedings. In fact, it was specifically excluded from the record by an Order of the Fifth Circuit dated October 6, 1975.

Petitioners attempt to equate future development, and the need for an environmental impact statement, to the further construction of private homes by individuals who are not even parties to this litigation. In support of Petitioners' contention that "only fifty houses had been built" (Petition, page 12), Petitioners cite the extent of development at the time of trial, almost three years ago. However, the development has progressed continuously since the project was started, and actual development far exceeds the obsolete facts relied upon by Petitioners.

Moreover, although Petitioner's 49-page complaint challenged virtually all work at the project, construction of additional homes was not a matter about which

petitioners complained.* Petitioners no doubt omitted the construction of private homes from their complaint because no permit is required for such construction, and accordingly the question of an EIS is not even involved. As the Court of Appeals noted, all of the matters about which petitioners did in fact complain, have been "substantially completed" for several years now.

2 — *Response to Petitioners' Second "Question Presented"*

Petitioners' statement of the second question presented reads:

> "Whether the application of laches is appropriate where admitted violations of federal criminal laws have been committed by those invoking the doctrine of laches."

Nowhere during proceedings before the lower courts was this issue even suggested. There was no "admitted" violation, nor was there any suggestion in this civil proceeding that a *crime* had been "committed". Thus, petitioners' second "Question Presented" attempts to seek review of an issue not even presented to, or properly before, the lower courts.

As the Special Master noted in his First Supplemental Report dated January 10, 1975, the issue of laches was severed, by agreement of the parties, and tried

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* Ironically, Petitioners apparently contend they are trying to protect individuals who have not yet built their homes at Eden Isles, but the Eden Isles Property Owners Association actually intervened in this suit on the side of the developer, in opposition to Petitioners.

separately. The District Court, in its order dated January 27, 1975, adopting the Report of the Special Master noted: "The matter did not reach trial on the merits, and accordingly the Special Master made no findings or conclusions as to whether the projects required or had been developed with federal permits, environmental statements, or in accordance with applicable federal law."

For the purpose of considering whether Petitioners' claims were barred by laches, the Court of Appeals reached its conclusion, based on the assumption that the challenged work might *arguably* require other federal permits or an environmental impact statement.

There was never any question before the District Court or the Court of Appeals of the commission of a crime. In fact, at no time during proceedings below was there ever any admission, or finding, of improper conduct in any respect. To the contrary, the lower courts merely considered whether Petitioners' complaint was barred by laches, assuming that further federal authorization might arguably be involved.

RESPONDENTS' RESPONSE TO PETITIONERS' SECTION ENTITLED "CONFLICT OF CIRCUITS"

Petitioners cite four cases, which, Petitioners contend, conflict with the Fifth Circuit's decision in this matter. However, rather than conflicting with the Appeals Court's decision in this case, the cases cited by Petitioners actually apply the doctrine of laches, and are easily reconciled with the holding of the Court of Appeals in this case.

In *Environmental Defense Fund vs Tennessee Valley Authority*, 468 F2d 1164 (CA 6-1972), cited by Petitioners, the court was concerned with "segmented analysis" of environmental impact with respect to an "on-going" or continuing federal project which was only partially completed. The court concluded that "the only significant 'stage' of construction is that which directly causes the significant environmental effects anticipated by the project planners". (at 1180).

Instead of rejecting the doctrine of laches, the court actually considered laches and concluded that there had been no unreasonable delay in bringing suit. (at 1182). The court felt that an EIS could still provide useful information *before* the significant stage of construction had been completed. In the case now before this Court, the entire project is "substantially complete", and all of the work which arguably required a federal permit (and, accordingly, perhaps an EIS) was completed years ago.

Petitioners next cite *Arlington Coalition on Transportation vs Volpe*, 458 F2d 1323 (CA 4-1972), cert. den. 409 US 1000 (1972), in which the court ordered an environmental analysis, because the project had not progressed to the point where the cost of altering or abandoning the proposed route would certainly outweigh the benefits which might accrue to the general public. The court said that it could not define the point of completion beyond which an EIS was no longer required, noting, however, that that point had not yet been reached, as "actual construction on the highway itself has not begun." (at 1332) Accordingly, the *Arlington* case is wholly inapplicable to the Eden Isles development, which the Court of Appeals analyzed in great detail and concluded was a "substantially completed project".

The third case cited by Petitioners is *I-291 Why? Association vs Burns*, 517 F2d 1077 (CA 2-1975), a per curiam affirmance of a district court decision, in which the appeals court actually considered the doctrine of laches but concluded that it did not bar suit, noting the absence of progress during the alleged delay. In effect, the court concluded that there was no prejudice to the defendant, an essential element in the application of laches.

The fourth case cited by Petitioners is *Steubing vs Brinegar*, 511 F2d 489 (CA 2-1975). At the time of trial, the bridge involved in that action was only 3% complete. The court found that plaintiff had not delayed unreasonably in filing suit, and that "the project was still at a stage where substantial environmental savings might result from preparation of an EIS". (at 494) As the Court of Appeals noted throughout its opinion in the case before this court, the Eden Isles project was "substantially complete by late 1974". (549 F2d 1026, 1028, 1029)

Contrary to Petitioners' contention that the four cases discussed above rejected laches, those cases actually examined the facts before those courts, and concluded, based on those facts, that laches was not applicable to bar plaintiffs' claims. There appears to be no holding that supports Petitioners' argument that laches, when otherwise applicable, becomes inapplicable solely because an environmental issue is involved.

CONCLUSION

Petitioners are requesting that an EIS be prepared with respect to the continuation of construction of private homes at a "substantially completed"

development. An EIS is not even required for such work; and with respect to the work which was challenged in proceedings below, Petitioners' claims are barred by laches, based on the facts before the Court of Appeals. Moreover, the Court of Appeals concluded that "the preparation of an EIS at this point would produce very little, if any, environmental benefit . . . [based on] the testimony of one of SOWL's own witnesses". (549 F2d 1029)

The Fifth Circuit's decision in this case is consistent with the application of the doctrine of laches by other Circuits.

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

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